

TTP2243, TTP2244, TTP2245, TTP2251 and TTP2260

Rule H18(c) Note - 03 August 2023

I have considered the Sole Reference Documents (and the appendices thereto) submitted by the several Dispute Parties. By ADR Rule H18(c) I am required to identify and itemise all relevant issues of law raised in the dispute.

The disputes concern four Restrictions of Use decisions made by Network Rail. Those decisions are required to be made in accordance with the provisions of Part D of the Network Code. In particular, the decisions are required to be made following the application of the Decision Criteria set out in Part D4.6 of that code.

In exercising its contractual discretion to make those decisions Network Rail is obliged to have regard to all relevant and material facts and matters known (or which it ought to have known) to it at the time the respective decisions were made. Network Rail has a duty to exercise its discretion in good faith, rationally and not capriciously. See *Braganza v BP Shipping Ltd* [2015] UKSC 17.

The discretion vested in Network Rail must also be exercised consistently with its contractual purpose – see *British Telecommunications plc v Telefonica O2 UK Ltd* [2014] UKSC 42, at para 172.

Of the five disputes before the Panel, two of the decisions challenged were made on 4 July 2023, one on 6 July 2023 and one on 20 July 2023. Thus, the foci of the Panel will be the facts and matters known (or which ought to have been known) to Network Rail on those dates and reasonable application by Network Rail of the Decision Criteria to them.

By ADR rule A7(a) and (b), in arriving at its conclusions the Panel must have regard to any relevant published TTP determinations and is bound by any relevant decisions of the ORR on a Regulatory Issue and any relevant decisions of the courts.

All parties appear to be aware of the close similarity of the issues raised in and determined in TTP2207 and those raised in the subject disputes. TTP2207 concerned a decision made by Network Rail on 03 April 2023 concerning the Week 11 Timetable Offer. TTP2207 was heard on 10 May 2023 and the determination was issued on 24 May 2023. Accordingly, the parties will need to focus on those dates and on any new and material facts, data and information which became available (or which ought to have become available) to Network Rail since then and the date of each of the subject decisions were made.

John Hewitt

3 August 2023